APPENDIX A.

Opinion of the Trial Court.

Defendant contends that §484(i) of the Penal Law as enacted by Ch. 372 L. 1965 is too vague and indefinite to meet the constitutional standard of "due process" (*People v. Kahan,* 15 N.Y.2d 311; *People v. Bookcase, Inc.,* 14 N.Y.2d 409; *People v. Kaplan,* 44 Misc.2d 110). This issue, however, has been settled to the contrary (*People v. Tannenbaum,* 18 N.Y.2d 268; *Bookcase, Inc. v. Broderick,* 18 N.Y.2d 71).

So far as concerns defendant's argument that the enactment of §484(h) repealed, by implication §484-(i), it need only be pointed out that §484(h) (Ch. 327 L. 1965) became law on June 7, 1965 to become effective on September 1, 1965, while §484(i) (Ch. 372, L. 1965) became law on June 14, 1965, to become effective on July 1, 1965. Thus, if there was any repeal by implication—and we do not so hold—it would have been §484(h) which would have been repealed, since that was the statute first enacted.

Inasmuch as *Tannenbaum* holds that constitutional standards require scienter only as to the contents of the publication (*Smith v. California,* 361 U.S. 147), and not of the age of the purchaser, we are constrained to hold that the People have established beyond a reasonable doubt, all that the statute requires them to prove. As a consequence, I hold that the motion to acquit must be denied and the defendant is found guilty.

Bloom, J.

Judge Bloom

After trial, the defendant is found Guilty as charged.

L.A.C.

Judge Cioffi

After trial, the defendant is found guilty.

H.B.E.

Judge Evans

APPENDIX B.

Opinion of the Appellate Term, First Department.

Appellate Term, First Department, No. 213 May, 1967
The People of the State of New York, Respondent, against David Rabeck, Defendant-Appellant.

DISSENTING MEMORANDUM

Jacob Markowitz, J.:

While upholding the constitutionality of section 484-i of the Penal Law in People v. Tannenbaum, 18 N Y 2d 268, in a 4 to 3 decision, the Court of Appeals nevertheless stated on page 273:

> "Section 484-i requires *scienter* of obscenity, i.e., some knowledge by the bookseller of the character of the book being sold. This is the constitutional mandate of Smith v. California (361 U.S. 147)".

The record reflects only that the purchaser of the magazines ("Snip" and "Trojan") briefly held them up (5 to 10 seconds) with their names showing and gave to the defendant the exact purchase price. There was no conversation. The record does not indicate whether the store or the defendant was busy at the time of the transaction. This would have been easily discernible at the time of the trial. The trial record does not show whether defendant was the owner, an employee or merely a cashier, the volume of business and the status of defendant relative directly to the opportunity and the interest of the defendant in observing and directing his attention to this particular transaction. These factors also relate to and condition the al-

leged obligation of the defendant who exercised a reasonable inspection which would disclose the nature of the magazines.

There was no proof of knowledge by the defendant to establish scienter. The People have failed to prove a prima facie case.

The conviction should be reversed on the law and the facts and the information dismissed.

APPENDIX C.

Certificate Denying Leave to Appeal.

State of New York, Court of Appeals Before: Hon. Stanley H. Fuld, Chief Judge.

The People of the State of New York, Respondent, against David Rabeck, Defendant-Appellant.

I, Stanley H. Fuld, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to section 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

On this application, the appellant urged (1) that section 484-i of the Penal Law was vague, contrary to the requirements of due process as guaranteed by the Fourteenth Amendment (see *People v. Tannenbaum*, 18 N Y 2d 268) and (2) that the proof of scienter was insufficient under the due process clause of the Fourteenth Amendment.

Dated at New York, New York June 23, 1967.

Stanley H. Fuld
Chief Judge

APPENDIX D.

Judgment of the Appellate Term, First Department.

At an Appellate Term of the Supreme Court, First Department, held on the County Court House, Borough of Manhattan, City of New York, on the 15th day of June 1967.

Present-Hon. Samuel H. Hofstadter *J. P.* Samuel M. Gold, Jacob Markowitz (dissenting) *Justices.*

The People of the State of New York Respondent, vs. David Rabeck, Defendant-Appellant May #213.

Filed June 15, 1967.

An appeal having been taken to this court by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of Bronx after trial before Hon. S. Cioffi, Bloom, Evans on the 23rd day of June 1966 upon the charge of violation of §484-1 of the Penal Law and having been sentenced by Hon. S. Skodnick, Shalleck, Phipps (Shalleck, J. dissenting) on the 25th day of January 1967 as follows.

6 months in the Workhouse, execution of sentence suspended, and the said appeal having been heard and due deliberation having been had thereon.

It Is Ordered and Adjudged that the said judgment so appealed from be and the same is hereby affirmed.

Enter.

Justice Appellate Term
Supreme Court, First Department

APPENDIX E.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . . abridging the freedom of speech, or of the press; . . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Laws of New York 1965, Chapter 372; McKinney's Consolidated Laws of New York, Penal Law §484-i, Effective July 1, 1965:

> *§484-i. Sale or delivery of pornographic material to minors under the age of eighteen*
>
> Any person who knowingly sells, lends or gives away to a person actually or apparently under the age of eighteen years:
>
> 1. any photograph, drawing or similar representation, whether singly or in sets or contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their

curiosity as to sex or to the anatomical differences between the sexes and which shows, depicts or reveals such person or persons:

(a) with less than a fully opaque covering of his or her genitals, pubic areas or buttocks, and, if that person is a female, with less than a fully opaque covering of any portion of the breast below a point immediately above the top of the areola, or

(b) with his or her genitals in a state or condition of sexual stimulation or arousal, or

(c) engaged in an act or acts of masturbation, homosexuality, or sexual intercourse, or in physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, or

2. any collection, series or combination of photographs, drawings or similar representations, whether or not contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and depicted or shown in such a posture or way that the viewer's attention or concentration is primarily focused on that person's or those persons' genitals, pubic areas, buttock or buttocks, female breast or breasts, and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes, or

3. any book, "pocket book", pamphlet or magazine, phonograph record, tape or similar electronic

reproduction of sound, containing details, descriptions, or narrative accounts of:

(a) the genitals in a state or condition of sexual stimulation or arousal, or

(b) acts or masturbation, or

(c) acts of homosexuality, or

(d) acts of sexual intercourse, or

(e) acts of physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, which contact is made in an act of sexual stimulation, gratification or perversion,

which details, descriptions or narrative accounts are witten or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes and which are to be distinguished from flat and factual statements of the facts, causes, functions or purposes of the subject of the writing or presentation, such as would be found in bona fide medical or biological testbooks, shall be guilty of a misdemeanor.

For the purposes of this section, "knowingly" shall mean having knowledge of the character and content of any item described in this section, or failure to exercise reasonable inspection which would disclose the character and contention of the item.

If any part or provision of this section or its application to any person or circumstances is for any reason adjudged invalid or unconstitutional

by a court of competent jurisdiction, such judgment shall be limited in its effect to the facts involved in the controversy in which such judgment shall have been rendered and shall not affect the validity of the remainder of this section or its application to other persons and circumstances; and the legislature hereby declares that it would have enacted this section without the invalid part, provision or application had such invalidity been apparent.

APPENDIX F.

Laws of New York 1965, Chapter 327; McKinney's Consolidated Laws of New York, Penal Law §484-h, Effective September 1, 1965:

§484-h. Exposing minors to harmful materials

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual

excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.

APPENDIX G.

Opinion of District of Columbia Court of General Sessions, Criminal Division.

United States, Plaintiff v. Nikki M. Nardone, et al., Defendants. Criminal Action Nos. US 5156-65; US 10624-25-65; US 7205-07-65; US 711-12-66; US 1790-66; US 2185-66; US 1099-66; US 1100-66.

In these cases, a number of defendants are charged with violations of D. C. Code § 22-2001, which prohibits obscene and indecent publications and performances. The evidence consists of films, photographs, and a description of performances at the Gayety Theater. There was also testimony concerning the conditions surrounding the sales and exhibitions.

Ever since *Roth v. United States,* 354 U.S. 476 (1957), the constitutional test of obscenity[1] has been whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appears to the prurient interest. This test was reaffirmed in *Jacobellis v. Ohio,* 378 U.S. 184 (1964), and most recently in *Ginzburg v. United States,* .... U.S. .... (1966). Under this test, "'three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters;

[1]The prosecutor conceded during argument that the materials and performances involved in the present cases constitute speech or expression; and that, unless these materials are obscene within the standards laid down by the Supreme Court, they are protected by the First Amendment.

and (c) the material is utterly without redeeming social value." *A Book Named "John Cleland's Memoirs of a Women of Pleasure" v. Massachusetts,* .... U.S. .... (1966). Thus, the law is that books, films, photographs, or performances cannot be held to be obscene unless, among other things, they offend against contemporary community standards. Since measuring against a standard is hardly feasible unless that standard is first established, contemporary community standards must, in some way, be brought to the attention of the trier of facts if he is to be able to decide the ultimate question of obscenity.

Yet there was no evidence whatever before the Court on that issue. Despite invitations by the Court, and despite being given a continuance of several weeks for that specific purpose, the prosecution declined to introduce evidence of contemporary community standards, claiming that such evidence was unnecessary.

The authorities cited in support of the government's position are neither conclusive[2] nor persuasive. Other opinions are far better reasoned. See for example, Judge Waterman's dissent[3] in *United States v. Davis,*

[2]In *Kahm v. United States,* 300 F. 2d 78 (C.A. 5, 1962), *cert. denied,* 369 U.S. 859, the issue was whether *expert* testimony was required. It may well be that in some instances opinion evidence can be dispensed with, but what is plainly necessary is some factual basis upon which the trier of facts is able to base a conclusion concerning contemporary community standards. Moreover, the *Kahm* court did not properly distinguish between the prurient interest factor and the community standards issue. See note 7 *infra.* As for *A Quantity of Brooks v. Kansas,* 379 P. 2d 254 (Kan. 1963), not only is there nothing in the opinion which deals with the problem here under discussion, but the Kansas Supreme Court decision was actually reversed by the U. S. Supreme Court. 378 U.S. 205 (1964).

[3]The majority decided *Davis* on the basis of what is considered to be a trial stipulation that no evidence of community standards was required. It did not disclose its view of the law absent such a stipulation.

353 F. 2d 614 (C.A. 2, 1965);[4] and see also, *United States v. Klaw*, 350 F. 2d 155 (C.A. 2, 1965); and *A Book Named "John Cleland's Memoirs of a Women of Pleasure" v. Massachusetts*, ... U.S. .... (1966) (Mr. Justice Douglas, concurring).

The government suggests that the Court may infer contemporary community standards by the method of judicial notice or by relying upon its own general feeling about the matter.

Knowledge of contemporary community standards can no more be said to be available to the trier of facts on a judicial notice basis than knowledge of the myriads of other facts which must normally be proved in an evidentiary way during the course of litigation. This is so especially if the standards by which the material must be judged are those of the nation rather than those of a particular locality. Mr. Justice Brennan stated in *Jacobellis v. Ohio, supra*, that the standard is a national one, and while the issue has not been squarely decided one way or the other, the Brennan view clearly represents the soundest approach, which this Court adopts as its own.[5]

It is conceivable that which respect to so-called "hard-core pornography" the deviation from contemporary community standards can be the subject of judicial

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[4]Judge Waterman said (353 F. 2d at 616-17): "I am not persuaded that, without some evidence other than the records and labels and each juror's personal reaction thereto, a jury can accurately express in the light of national community standards the level of national community tolerance."

[5]We are dealing here with a constitutional question, and the answer must therefore be the same wherever the Constitution applies. Local mores can no more dictate the constitutional standard of obscenity than they can supply a standard with respect to racial discrimination or segregation.

notice. But the materials involved in these cases are not such that their deviation from the national level of tolerance is commonly known or capable of certain verification. For example, counsel for the defendants suggested during oral argument that bare-breasted performances are commonly accepted in most large cities, a statement with which the prosecutor did not agree. Whatever may be the truth concerning the defense statement, and whatever may be the impact of the true facts upon the ultimate decision regarding national standards, this controversy clearly illustrates that the contemporary community standard is not so certain or so easily verifiable as to be capable of being judicially noticed without the benefit of evidence.

This Court, of course, has its own personal standards; it also has a general opinion regarding community standards, at least those in the locality. But the Court's private views and opinions are not, and should not be, determinative. As Mr. Justice Frankfurter said in his concurring opinion in *Smith v. California*, 361 U.S. 147, 165 (1959) ". . . the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience in life, but on the basis of 'contemporary community standards.'"

To proceed on the assumption that the trier of facts —particularly a judge sitting without a jury—should decide on the guilt of an accused in a criminal case on the basis of his personal opinion concerning the acceptability of a certain film, book, or performance, without having heard any evidence whatever on the question, is to substitute judicial censorship for censorship by the police. Censorship—particularly censorship

unfettered by any restraints or safeguards[6]—is a repugnant to the First Amendment, whether the censor wears a uniform or a robe.

When evidence on contemporary community standards is supplied, the judge can decide the case in the customary judicial manner, based upon that evidence. But when there is no evidence[7] on the critical issue, the judge could reach a decision only by relying upon his own predilections and prejudices. When a judge condemns without evidence he is acting not as a court of law but as a censor. I decline to accept that role which the government would thrust upon me.

In free speech cases, the burden is always on the prosecution to demonstrate the applicability of an exception to the reach of the First Amendment. Moreover, since this is a criminal case, the burden is again on the prosecution to prove every element of the offense.[8] Yet, as indicated, the prosecution declined the invitation to produce testimony on contemporary community standards, possibly out of the feeling that the collection of this kind of evidence in misdemeanor cases was not worth its while. But if cases are of sufficient importance to be tried, they are of sufficient

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[6]When there is no evidence, there is nothing for an appellate tribunal to review, unless the appellate judges were to substitute their personal opinions for the personal opinion of the trial judge.

[7]In that respect, the community standards question is unlike the prurient appeal question. Conceivably that question could be decided on the basis of the physical evidence alone.

[8]D. C. Code § 22-2001 requires proof that the particular matter is obscene. Material cannot be said to be obscene unless it is shown to depart from contemporary community standards. Thus, the statute no less than the Constitution makes departure from standards of community tolerance an integral part of the offense.

importance to be tried in accordance with law. This Court firmly intends to enforce adherence to that standard.

The responsibility for the absence of evidence on the critical issue is squarely the government's,[9] and the Court has no alternative to a dismissal of the charges.

The defendants will be acquitted. It should be understood, however, that the Court expresses no opinion beyond the conclusion that the prosecution failed in these cases to prove a vital element of the offenses.

/s/ Harold H. Greene

Judge

July 7, 1966.

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[9]Defense counsel stated that he would be prepared to offer evidence on the community standards issue if the prosecution proceeded to do so.